98-674

IN THE UNITED STATES SUPREME COURT

October 1998 Term

This is a Capital Case

FILED
NOV 20 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

HEATH WILKINS,	)	
	)	
Respondent,	)	
	)	
vs.	)	Case No. 98-674
	)	
MICHAEL BOWERSOX,	)	
	)	
Petitioner.	)	

MOTION TO PROCEED IN FORMA PAUPERIS

COMES NOW respondent, Heath Wilkins, pursuant to Rule 39, and respectfully requests that this Court allow him to file his opposition to petitioner's petition for writ of certiorari in forma pauperis. In support of this motion, respondent states that he is totally without funds or resources with which to pay any fees associated with this petition. Respondent further states that he has been found indigent and received appointed counsel at all stages of his federal court challenges to his conviction and death sentence and that undersigned counsel have been appointed in this action pursuant to the Criminal Justice Act.

Respectfully submitted,

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and
ELLEN Y. SUNI, #36835
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Counsel for Respondent

48 pp

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was forwarded by regular United States mail, postage prepaid, to:

Cassandra Dolgin
Assistant Attorney General
P. O. Box 899
Jefferson City, MO 65102

on this 20th day of November, 1998.

Lisa A. O'Connor

Counsel for Respondent



IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

HEATH A. WILKINS, Petitioner, vs. PAUL K. DELO, Respondent.	)	Case No. 91-0861-CV-W-5

ORDER

Before the Court is the motion of appointed counsel, Sean D. O'Brien, to authorize payment of interim fees of $125 per hour plus expenses. Good cause being shown, Petitioner's motion is granted. Accordingly, it is hereby

ORDERED that the hourly rate for appointed counsel Sean D. O'Brien be, and hereby is, set at $125.00 per hour and that said order shall be effective for services rendered from and after October 1, 1995. It is further

ORDERED that the clerk of the court be, and hereby is, directed to process and pay appropriate monthly, interim fee and expense applications submitted by Mr. O'Brien for his work in this matter.

Dated this 11th day of January, 1996.

/s/ Scott O. Wright

SCOTT O. WRIGHT, JUDGE
UNITED STATES DISTRICT COURT

ORIGINAL

DOC. # 72

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-2441WMKC

Michael Bowersox

Appellant,

vs.

Heath A. Wilkins

Appellee.

Appeal from the United States District Court for the Western District of Missouri

On counsel's motion the Court hereby grants an interim payment to be made to Sean O'Brien, appointed counsel in the above captioned appeal in the amount of [redacted].

November 12, 1996

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-2441WMKC

Heath Allen Wilkins,

Appellee,

vs.

Michael Bowersox,

Appellant.

Appeal from the United States District Court for the Western District of Missouri

Motion of appellee for appointment of co-counsel has been considered by the court and is hereby granted.

The clerk of this court is directed to enter his routine order appointing Prof. Ellen Y. Suni of Kansas City, Missouri under the terms of the Criminal Justice Act as amended.

September 3, 1996

Order Entered Under Rule 27B(a):

Michael E Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

No. 98-674

IN THE UNITED STATES SUPREME COURT

October 1998 Term

This is a Capital Case

HEATH WILKINS,

Respondent,

vs.

MICHAEL BOWERSOX,

Petitioner.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 10

I. THE CASE IS MOOT 10

II. THE COURT BELOW GRANTED RELIEF NOT BECAUSE OF A HYPOTHETICAL FAILURE BY THE STATE TRIAL JUDGE TO MEET SOME "MECHANICAL FORMULA," BUT BECAUSE THE TOTALITY OF THE CIRCUMSTANCES ESTABLISHED THAT THE MENTALLY ILL JUVENILE OFFENDER'S WAIVER OF COUNSEL AND PRO SE PLEA OF GUILTY IN THIS CAPITAL CASE WERE NOT KNOWING, VOLUNTARY AND INTELLIGENT 13

1. Unlike the state courts, the courts below appropriately considered Wilkins' experienced defense attorney's repeated warnings that his client's waiver and plea were not knowing, voluntary and intelligent 16

2. Unlike the state courts, the courts below appropriately considered the testimony of mental health experts, including state-employed examiners Dr. Steve Mandracchia and Dr. Sam Parwatikar, that Wilkins' was mentally disturbed, and did not act knowingly, voluntarily and intelligently. 18

3. Unlike the state courts, the courts below appropriately considered Wilkins' isolation, youth, and his history of abuse and neglect in determining whether his waiver of counsel and plea of guilty were knowing, voluntary and intelligent. 21

4. The courts below appropriately considered the record of the state competency, waiver of counsel, plea, sentencing and postconviction hearings, in addition to the totality of the circumstances, in finding that Wilkins' plea of guilty and waiver of counsel were not knowing, voluntary and intelligent. 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Carafas v. La Vallee, 391 U.S. 234 (1968) 12

DeFunis v. Odegaard, 416 U.S. 312 (1974) 11

McCarthy v. United States, 394 U.S. 459 (1969) 23

Michigan v. Long, 463 U.S. 1032 (1983) 13

Parker v. Dugger, 498 U.S. 308 (1991) 19

Parker v. Ellis, 362 U.S. 574 (1960) 12

State ex rel City of Kansas City v. Meyer, 513 S.W.2d 414 (Mo. 1974) 10

State v. Arnold, 419 S.W.2d 59 (Mo. 1967) 10

State v. Blaylock, 394 S.W.2d 364 (Mo. 1965) 10

State v. Wilkins, 736 S.W.2d 409 (Mo. 1987) 8

United States v. Broce, 488 U.S. 563 (1989) 23

VonMoltke v. Gillies, 68 S.Ct. 316 (1948) 14

Wilkins v. Bowersox, 145 F.3d 1006, 1008 (8th Cir. 1998) 2, 7

Wilkins v. Bowersox, 933 F. Supp. 1496 (W.D.Mo. 1996) 15

Wilkins v. State, 802 S.W.2d 491 (Mo.) (en banc),
cert. denied, 502 U.S. 841 (1991) 9, 15

IN THE UNITED STATES SUPREME COURT

October 1998 Term

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HEATH WILKINS,	)	
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Respondent,	)	
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vs.	)	**Case No. 98-674**
	)	
MICHAEL BOWERSOX,	)	
	)	
Petitioner.	)	

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Court below affirmed the judgment of the district court finding that a psychiatrically disturbed sixteen-year-old offender's waiver of counsel and pro se plea of guilty to a capital charge were not knowing, voluntary and intelligent made. This Court should deny the petition for writ of certiorari because the petition has been rendered moot by an order of the state court granting respondent's motion to withdraw his pleas of guilty. Furthermore, petitioner mischaracterizes the opinions below to manufacture an issue not presented by this case. The courts below did not apply or require any mechanistic or ritualistic formulae, but instead properly and thoroughly examined the totality of the circumstances and correctly determined that Wilkins' waiver of counsel and pleas of guilty were not knowingly, voluntarily and intelligently made. There is thus no basis on which certiorari can properly be granted.

JURISDICTIONAL STATEMENT

In the absence of a "case or controversy," this Court has no jurisdiction under Article III of the Constitution. There is no longer a case or controversy in relation to this cause in that the Clay County Circuit Court on October 30, 1998, sustained respondent's motion to withdraw his plea, ordering that "guilty pleas in all three causes be set aside and held for

naught." (Respondent's supplemental appendix, pp. 4-6).[1] On that same day Respondent entered pleas of not guilty. (Id.). Thus, the convictions which were the subject of respondent's petition for writ of habeas corpus no longer exist.

STATEMENT OF THE CASE

The court below issued the writ of habeas corpus upon finding that a mentally ill juvenile offender's waiver of counsel and pro se plea of guilty to a capital charge were not knowing, voluntary and intelligent. Petitioner omits material facts which are an important part of the record and support the outcome below.

The state court record established that Wilkins was a severely abused child who was psychiatrically ill with a plethora of mental difficulties, which the court of appeals briefly summarized:

> From infancy through his teenage years, Wilkins suffered severe physical and emotional abuse at the hands of his mother and other adults in his life. He began abusing drugs as a kindergartner on his way to school. At the age of 10, he became a ward of the state as a result of his involvement in a burglary. A mental health evaluation at that time described Wilkins as a severely depressed boy with homicidal and suicidal tendencies. During the years that followed, he was transferred in and out of mental health facilities. By the age of 16, Wilkins was living on the streets with three other teenagers.

Wilkins v. Bowersox, 145 F.3d 1006, 1008 (8th Cir. 1998). The group of runaways included Wilkins, a girl called "Midget" and two older boys known as "Bo" and "Shades." They slept in a park and stole money for food. (P.C. tr. 253; Ex. P - 14, p. 5).

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[1]Although the state might have filed an interlocutory appeal of Judge Russell's order under Missouri Revised Statute § 547.200.2, no such appeal was filed. The five-day period within which to file a notice of appeal has expired, and the order of the Clay County Circuit Court is final. § 547.200.4.

On July 27, 1985, they robbed a liquor store and fatally stabbed the clerk, Nancy Allen, a twenty-six-year-old mother of two. (J.A. 255). All four teenagers were arrested on Saturday, August 10, 1985; (J.A. 217, 228) the following Thursday, the juvenile court certified Wilkins to stand trial as an adult on the charge of first degree murder.[2]

At Wilkins' arraignment, Public Defender Fred Duchardt told the court, "there is some question in my mind whether Mr. Wilkins is competent to proceed at this point." (J.A. 609). The court ordered a mental examination by state psychologist Steve Mandracchia, who concluded that Wilkins did not suffer from a psychosis, and that he was competent to proceed. He did not direct his examination toward other disorders not rising to the level of psychosis (P.C. tr. 779), except to "generally agree" with Wilkins' past psychiatric diagnoses. (J.A. 617).[3]

A second evaluation was performed in March and April, 1986, by Dr. William A. Logan, Director of Law and Psychiatry at the Menninger Foundation, and psychologist Melvin Berg. (J.A. 622). In January, 1986, Wilkins advised Duchardt that he wanted to be put to death. Although Dr. Mandracchia and Dr. Logan were aware of Wilkins' desire, neither was asked to examine the voluntariness of his decision. However, Dr. Logan indicated that Heath was operating under "several factual errors, not delusions but just errors of fact" relating to the crime and its consequences. He warned of Wilkins' "emotional impairment where he would not be acting in necessarily his own best interests," and concluded:

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[2]Petitioner is mistaken that this was one month short of Wilkins' seventeenth birthday. (Petition for Writ of Certiorari, hereafter "Pet.," p. 4). Wilkins turned seventeen January 6, 1986, almost six months later. (P.C. tr. 760; Ex. P-14).

[3]In the state postconviction proceeding, Dr. Mandracchia indicated that Wilkins' score on psychological tests for mental confusion was "quite high," which correlates with poor judgment, acute stress and schizophrenia. (P.C. Tr. 768-71).

> So, really, weighing the two factors, he has a fairly good cognitive and rational understanding of what court procedures are about, but *there is some emotional things involved that could interfere with his decision making process at certain critical points.*

(J.A. 626) (emphasis added). Wilkins' desire to die was the product of a "pervasive developmental defect . . . stemming out of the kind of home environment and other past experiences that he's had." (J.A. 644) Dr. Logan believed that "eventually at some point [Wilkins] would change his mind." (P.C. tr. 512). Mr. Duchardt argued that there was "considerable question" about Wilkins' competence to proceed and "to make the kinds of choices particularly that come to bear in a capital case as is before the court." (J.A. 647). Judge McFarland summarily ruled from the bench that Wilkins was competent to proceed. (J.A. 647).

Wilkins then moved to proceed *pro se*. (J.A. 647-48). The court's inquiry included the following:

> THE COURT: You are not skilled in the law. And what is your age?
> DEFENDANT: Seventeen, Your Honor.
> THE COURT: And the extent of your education?
> DEFENDANT: Ninth grade, Your Honor.
> THE COURT: So, you are really not familiar at all with legal proceedings, are you?
> DEFENDANT: That is correct.
> THE COURT: During the course of making decisions you would not have the background of legal knowledge or experience that a lawyer would possess, isn't that correct?
> DEFENDANT: Yes, Your Honor. I'm not, I don't, okay, that is correct.

(J.A. 649). The court expressed reservations about Wilkins' request:

> THE COURT: But, on the other hand, at his age and with his lack of legal training and schooling and considering the seriousness of the offense, this court feels that the availability of legal counsel is essential so that he can rely upon it, at least if he wants to, you see?

(J.A. 650-51). The court told Wilkins with the advice of counsel, "you might make a different decision than you otherwise would."[4]

On April 23, 1986, the court resumed its inquiry into Wilkins' waiver of counsel. Judge McFarland advised Wilkins of his right to counsel, recited a partial list of his constitutional rights and told him that upon conviction he could receive the death penalty or life without parole. (J.A. 674-84). There was no discussion of lesser offenses such as second degree murder or manslaughter. When Judge McFarland asked Wilkins if he had discussed his decision with anyone else, he replied, "there's nobody else, nobody else who has a hand in my decision, your honor." (J.A. 680). Judge McFarland "strongly encourage[d]" Wilkins to accept the services of counsel. (J.A. 684). Mr. Duchardt again warned the court that "I personally don't feel that he's competent to make those decisions." (J.A. 686). The court told Wilkins, "I don't think it's in your best interest that you enter a plea of guilty." (J.A. 695). After a lunch recess, the court accepted Wilkins' waiver of counsel and granted Duchardt leave to withdraw. (J.A. 689-90).

On May 9, 1986, Wilkins entered *pro se* guilty pleas. The court again advised Wilkins to accept the services of counsel:

> . . . for all the reasons that he had previously mentioned. And I can't think of others that I didn't previously mention, but for all of those reasons. And there may be more that I can't think of, but certainly *because of your age, your limited education, your limited legal education, which you have none; and even to the extent that he's had more experience in life generally than you have to this point.*

(J.A. 713) (emphasis added). Wilkins told the court that before the hearing, one of the jail guards escorting him pushed his face into the wall and threatened him. The court asked

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[4]Dr. Logan testified that with the guidance of counsel, Wilkins would change his mind about his wish to die. (P.C. tr. 471-72, 512).

whether this affected Wilkins' decision to plead guilty. Wilkins said it did not, and there was no further mention of the incident. (J.A. 723-26). The guard remained in the courtroom throughout the hearing.

The guilty plea proceeded with the court asking leading questions about Wilkins' understanding of his rights, and Wilkins answering either "yes" or "no." (J.A. 725-48). Still, there was no mention of any lesser, parolable offense. The court accepted Wilkins' pleas on all charges (J.A. 749, 758, 768-69) and scheduled sentencing hearings for June 27, 1986. (J.A. 769). Mr. Duchardt sat in the corner of the courtroom throughout the plea. (J.A. 778).

On June 27, 1986, the court sentenced Wilkins to five years for Unlawful Use of a Weapon, (J.A. 780) and life on Armed Criminal Action. (J.A. 783-84). Mr. Duchardt repeated his warnings, reminding the court of Wilkins' youth and ignorance of the law. Heath concurred, "Yes, I would say that I was quite ignorant in these proceedings." (J.A. 793-94).

At the sentencing hearing, the court addressed Wilkins:

> THE COURT: When did you first decide that you wanted to, or do you want to ask for the death penalty?
> DEFENDANT: I'm, I'm telling you, you know, I never stated flat out that I want the death penalty.
> THE COURT: Okay.
> DEFENDANT: I stated that I would prefer the death penalty over spending life in prison, you know.

(J.A. 791). The court outlined Wilkins' sole punishment options as "the death penalty or life imprisonment without probation or parole or release except by act of the governor." (J.A. 788). The court never asked if Wilkins understood the elements of first degree murder. The court reiterated Wilkins' ignorance of the law:

> THE COURT: And maybe I didn't go over that quite enough when I alluded to the things that I have previously told you, but, we do have the information about your age, your lack of education in the legal field, you know nothing, you absolutely know nothing about this type of proceeding, do you?

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DEFENDANT: I wouldn't say absolutely nothing, Your Honor, but, yes, I would say that I was quite ignorant in these proceedings.

(J.A. 794). The prosecutor urged the court to sentence Wilkins to death. (J.A. 893-98). For the first time ever in the proceedings, the court asked Wilkins why he wanted to be put to death. (J.A. 900-01). Mental health experts referred to Wilkins' rambling, non-responsive soliloquy as evidence of Wilkins' thought disorder and ambivalent feelings about dying. (P.C. tr. 44-45, 47, 243, 338-40).

On appellate review of Wilkins' sentence, Wilkins again attempted to waive counsel. The court ordered psychiatrist Sam Parwatikar to "examine appellant and make a report to this Court on the question of appellant's competence to waive his right to counsel." (Ex. P-32). Dr. Parwatikar reported that Wilkins "was not capable of waiving his constitutional right to counsel." (P.C. tr. 849-50, 852, 857). He also testified that Wilkins' "decision to discharge his attorney was based on faulty reasoning..." (P.C. tr. 850). He observed that Wilkins vacillated in his decision, and offered contradictory and faulty reasons for seeking the death penalty--some of which indicated that he did not believe he would be executed. (P.C. tr. 857, 870-71). Dr. Parwatikar found that Wilkins suffers from a mental disorder which impaired his reasoning, rendering him "not competent to waive his Constitutional Rights and represent himself in front of the court." (Ex. P-13, p. 16). Dr. Parwatikar explained that Wilkins lacked "both a rational and factual understanding of the proceedings, and rational and factual decision making." (D.C. tr. 20). "Heeding Dr. Parwatikar's determination, the Supreme Court of Missouri set aside its prior proceedings and appointed counsel to represent Wilkins despite his protestations." Wilkins v. Bowersox, 145 F.3d 1006, 1010 (8th Cir. 1998). A divided Missouri Supreme Court, against Wilkins' wishes, appointed the public defender to represent

him, and affirmed the sentence without referring to Dr. Parwatikar's findings. State v. Wilkins, 736 S.W.2d 409 (Mo. 1987).

On June 30, 1988, Wilkins moved to set aside his conviction and sentence. (Post Conviction Legal File, hereafter P.C. L.F., 1). Dr. Dorothy Lewis, professor of psychiatry at the New York University School of Medicine, testified at a hearing on the motion that she observed symptoms of serious mental illness which were corroborated in Wilkins' records. (P.C. tr. 24-26). Wilkins' "paranoid orientation . . . played a major role in his dismissing his attorney." (P.C. tr. 27). She also found that he "was an adolescent and he did not have the judgment, the experience, whatever of an adult, but in his case far more important is the fact that he was illogical and ...couldn't really put together a case for himself. He was confused at times." (Id. at 28). She quoted passages from the sentencing transcript indicating Wilkins' confused and disordered thinking. (P.C. tr. 41-47).

Dr. William A. O'Connor, psychologist, "testified that Wilkins' guilty plea was not a voluntary and intelligent decision, but rather an emotionally-driven decision that was the product of his mental disorder." 145 F.3d at 1010. Dr. Logan explained his doubts about Wilkins' competence, and testified that Wilkins waived counsel without adequate factual knowledge of his legal options:

> Mr. Wilkins did not know anything about the appeal process or any of the subsequent offers he might've had at the beginning. . . as a suicidal person does, he did not look down the road to consider that he might view things more differently at another point in time and that he might choose to change his mind.

(P.C. tr. 497). Dr. Logan explained that "when he's emotionally aroused, he cannot use his cognitive abilities in a way that would help him reason and weigh risks and benefits of decisions." (D.C. tr. 35-36). Although there were some minor differences among the experts

as to Wilkins' diagnosis, Dr. Logan believed that "all the various individuals are coming down on the same side regardless of diagnosis. I think we all think he's severely disturbed." (P.C. tr. 511). Dr. Logan had warned Mr. Duchardt that eventually Wilkins would change his mind about his plea. (P.C. tr. 512).

The court of appeals summed up the state's case at the postconviction hearing:

> In response, the state called Mr. Duchardt and Dr. Mandracchia to testify. Mr. Duchardt stated he did not believe that any of Wilkins' decisions were made knowingly, intelligently, and voluntarily. He had consistently and forcefully made the same point in the trial court's proceedings. Dr. Mandracchia explained that his initial 95-minute examination was not designed to address the issue of whether Wilkins' waiver of counsel and guilty plea were knowing, intelligent, and voluntary. The postconviction court thus ordered Dr. Mandracchia to perform an additional evaluation of Wilkins that would be directed at these issues. After conducting clinical interviews lasting over seven hours, Dr. Mandracchia concluded that Wilkins' waiver of counsel, guilty plea, and waiver of offering mitigating evidence were made knowingly, but these decisions were not made voluntarily or intelligently. The postconviction court simply rejected the uncontroverted evidence as "unpersuasive."

145 F.3d at 1010. The Missouri Supreme Court affirmed, holding that the court was free to disregard *all* of the uncontradicted testimony of the experts who testified that Wilkins' waiver was not knowing, voluntary and intelligent. Wilkins v. State, 802 S.W.2d 491 (Mo.) (en banc), cert. denied, 502 U.S. 841 (1991).

Respondent filed a petition for writ of habeas corpus in the U.S. District Court, Western District of Missouri, raising the constitutional violations on which the courts below granted relief. The district court conducted a hearing in January, 1996. The court observed during Mr. Duchardt's testimony:

> Q. (by the court) Well, in this case there were red flags all over the place.
> A. (by Mr. Duchardt) I thought so, Judge.

Q. You had a 16-year-old boy, disturbed past, wanting the death penalty. I mean, the floor was covered with red flags. Right?
A. That's what I thought.
Q. And a matter of fact, you had said something about you didn't think he was competent.
A. Yes, sir.
Q. And then told the Judge that.
A. That's correct, sir.
Q. And then he goes through the same litany you go through with a bank robber that had been in prison eight or ten times.

(D.C. tr. 115-16). The district court on May 16, 1996, entered its order conditionally granting Wilkins' petition for writ of habeas corpus, ordering that the writ would become absolute if Missouri did not allow Wilkins to withdraw his plea within sixty days. (J.A. 1194-1281). The court of appeals affirmed.

Petitioner sought a stay of the mandate from the court of appeals for purposes of petitioning this Court for a writ of certiorari. (Supp. App. 4). That motion was denied September 1, 1998. (Id. 5). On October 30, 1998, the Clay County Circuit Court entered its order sustaining Wilkins' motion to withdraw his pleas of guilty, and Wilkins entered pleas of not guilty to all charges.

REASONS FOR DENYING THE WRIT

I. THE CASE IS MOOT.

Respondent on October 27, 1998, moved in the Circuit Court of Clay County, Missouri, to withdraw his pleas of guilty. The motion relied on the mandate of the court below and state law, alleging that "Failure to allow defendant to set aside his pleas would result in a manifest injustice. State v. Arnold, 419 S.W.2d 59 (Mo. 1967); State v. Blaylock, 394 S.W.2d 364 (Mo. 1965); State ex rel City of Kansas City v. Meyer, 513 S.W.2d 414 (Mo. 1974)." (Supp. App., pp. 1-2). The Clay County Circuit Court on October 30, 1998, sustained respondent's motion to withdraw his plea, ordering that "guilty pleas in all three causes be

set aside and held for naught." (Respondent's supplemental appendix, pp. 4-6).[5] On that same day Respondent entered pleas of not-guilty. (Id.).

Although petitioner sought a stay of the mandate of the Eighth Circuit, that motion was denied on September 1, 1998. No stay of the mandate was sought in this Court, and the Clay County Prosecuting Attorney stipulated to the entry of an order setting aside respondent's pleas of guilty.

The final order of the state court setting aside respondent's plea presents this Court with two significant obstacles to exercising jurisdiction. First, the issue which petitioner wants this Court to address is moot. Second, the motion to withdraw respondent's plea was based in part on state law grounds.

"Federal courts are without power to decide questions that cannot affect the rights of the litigants in this case before them." DeFunis v. Odegaard, 416 U.S. 312 (1974).[6] This principle applies with equal force where a state prisoner receives relief from his conviction

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[5]Although the state might have filed an interlocutory appeal of Judge Russell's order under Missouri Revised Statute § 547.200.2, no such appeal was filed. The five-day period within which to file a notice of appeal has expired, and the order of the Clay County Circuit Court is final. § 547.200.4.

[6]This Court decided that the case was moot, stating:

> In short, all parties agree that DeFunis is now entitled to complete his legal studies at the University of Washington and to receive his degree from that institution. A determination by this Court of the legal issues tendered by the parties is no longer necessary to compel that result, and could not serve to prevent it.

416 U.S. at 317. Similarly, the Circuit Court of Clay County, Missouri, has issued a final order permitting respondent to withdraw his plea, and returned the case to the active trial docket.

and sentence from a state court before his habeas petition reaches this Court; such a case is moot:

> 'The purpose of the proceeding defined by the statute [authorizing the writ of habeas corpus to be issued] was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail.' *McNally v. Hill*, 293 U.S. 131, 136. 'Without restraint of liberty, the writ will not issue. *Id.*, 293 U.S. 138. See also *Johnson v. Hoy*, 227 U.S. 245. 'It is well settled that this court will not proceed to adjudication where there is no subject-matter on which the judgment of the court can operate.' *Ex parte Baez*, 177 U.S. 378, 390. We have applied these principles to deny the writ of certiorari for mootness on the express ground that petitioner was no longer in respondent's custody in at least three cases not relevantly different from this one. *Weber v. Squire*, 315 U.S. 810; *Tornello v. Hudspeth*, 318 U.S. 792; *Zimmerman v. Walker*, 319 U.S. 744.

Parker v. Ellis, 362 U.S. 574, 575-76 (1960).[7] In one of the cases cited by this Court, Weber v. Squire, the petitioner was released after the district court had issued the writ, which rendered the case moot. (See 362 U.S. at 588 (Harlan, J., dissenting)). Similarly, Wilkins is no longer in the custody of Michael Bowersox. The conviction which was the subject of Wilkins' petition for writ of habeas corpus has been set aside by the Missouri trial court. He is a pretrial detainee in the Clay County Detention Center, 11 South Water, Liberty, Missouri.

A second obstacle to jurisdiction is that respondent's motion to withdraw his guilty pleas, which was sustained by the Clay County Circuit Court, was based in part on state law grounds articulated in Missouri Rule 29.11. That rule allows the withdrawal of a guilty plea

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[7]Although this Court has overruled Parker's holding that a prisoner's release on parole renders his habeas petition moot, Carafas v. La Vallee, 391 U.S. 234 (1968), this Court did so because the prisoner continues to suffer "collateral consequences" of his conviction. Id. at 237-38. This case is different because respondent prevailed in the court below, the state has fully complied with the judgment issuing the writ, and respondent is no longer suffering any collateral consequences of the judgment.

which is not knowing, voluntary and intelligent. Therefore, the state court judgment rests on independent, adequate state grounds. Michigan v. Long, 463 U.S. 1032 (1983). The petition should be dismissed.

II. THE COURT BELOW GRANTED RELIEF NOT BECAUSE OF A HYPOTHETICAL FAILURE BY THE STATE TRIAL JUDGE TO MEET SOME "MECHANICAL FORMULA," BUT BECAUSE THE TOTALITY OF THE CIRCUMSTANCES ESTABLISHED THAT THE MENTALLY ILL JUVENILE OFFENDER'S WAIVER OF COUNSEL AND PRO SE PLEA OF GUILTY IN THIS CAPITAL CASE WERE NOT KNOWING, VOLUNTARY AND INTELLIGENT.

Heath Wilkins is the youngest person to be sentenced to die for murder in the state of Missouri in over a hundred years. (J.A. 1023). This distinction was not the product of an adversarial proceeding in which he was found to be the most heinous teenager of the century. To the contrary, Wilkins was a homeless, psychiatrically ill child with a disturbing history of abuse and neglect when he was permitted to waive his right to counsel and plead guilty to a capital crime. In accepting and affirming Wilkins' waiver of counsel, Missouri courts ignored many warnings that he was not acting voluntarily and intelligently, including the unanimous testimony of every single mental health expert and Wilkins' experienced court-appointed counsel.

Petitioner mischaracterizes the decisions of the courts below in an attempt either to manufacture a conflict between the circuits that does not exist or to thrust this case into a conflict of which it clearly is not a part. The lower courts' detailed discussions of the facts of this unique and troubling case, woven throughout their opinions, belie petitioner's claim that they applied a "mechanical formula" or mandated a "rigid checklist" for assessing the validity of Wilkins' waivers and pleas. (Petition, p. 19). The court of appeals, using the very

standard urged by the petitioner in its brief in that court,[8] explicitly "consider[ed] the defendant's waiver in light of the totality of the circumstances, 'including the background, experience, and conduct of the accused.'" 145 F.3d at 1011. The opinions themselves reflect a conscientious examination of all the circumstances surrounding respondent's decisions.

The amount of time the lower courts devoted to examining the facts of the case indicate anything but a resort to a mechanical formula to determine the validity of Wilkins' decisions. In addition to what was said and what was not said during the proceedings, the federal courts examined the context of the discussions--lay and expert evidence of Wilkins' thought processes, what he knew and what he didn't know, his purpose in pursuing his waiver and plea, his youth, isolation, psychiatric illness, lack of education, and lack of understanding of the charges--in reaching the decision that "[t]he uncontroverted *record as a whole* throughout the state proceedings indicates that Wilkins' waiver of counsel was not knowing, intelligent, and voluntary." 145 F.3d at 1013. (emphasis added).

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[8]Petitioner advocated that the court of appeals should use the very standard that he now complains about, arguing: "[t]he purpose of the 'knowing and voluntary' inquiry. . .is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." Id., at 2687 n.12 (emphasis in original). Pertaining to the latter inquiry

> such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a pleas is tendered.

VonMoltke v. Gillies, 68 S.Ct. 316, 323 (1948). (Pet. br. at 22).

In sharp contrast to the Missouri courts, the district court and the court of appeals meticulously examined all the facts and circumstances in the case. Virtually every factor relating to the validity of a defendant's waiver of his constitutional rights weighed against accepting Wilkins' pro se guilty pleas.[9] In fact, the federal courts found fault in the Missouri courts' failure to address and resolve many of the factual issues necessary to properly apply the totality of the circumstances test petitioner advocates:

> After an exhaustive review of the entire file, this Court found that many disputed factual issues were not settled and some findings by the state courts were perplexing. The state record contains ambiguous or contradictory support for certain findings and conclusions, particularly those related to the claims challenging the waiver of counsel and guilty plea.

Wilkins v. Bowersox, 933 F. Supp. 1496, 1504-05 (W.D.Mo. 1996). The court of appeals likewise found the Missouri courts' decision constitutionally deficient because it simply ignored facts which were critical to the validity of Wilkins' waiver and plea in the totality of the documents.[10] Both courts below noted many facts in the state court record that are difficult, if not impossible, to reconcile with a valid waiver and plea. These include persistent warnings from defense counsel, mental health experts, and the state courts' own observations which should have alerted them that Wilkins was not acting voluntarily nor intelligently. Examination

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[9]Hence the resort by the Missouri Supreme Court to a rule that the trial court could properly disregard *all* of the evidence in affirming Wilkins' plea and sentence. Wilkins v. State, 802 S.W.2d 491, 501 (Mo.) (en banc), cert. denied, 502 U.S. 841 (1991).

[10] "[T]he [Missouri Supreme Court took no account of Wilkins' upbringing." 145 F.3d at 1012. "The state court made no fact-findings to indicate why it was unpersuaded by the unanimous testimony presented at the postconviction hearing, and the record simply does not support the state court's conclusion that Wilkins knowingly, intelligently, and voluntarily waived his right to counsel." Id. at 1014. "Neither state court considered petitioner's background or the unanimous opinion of all mental health professionals that the waiver was not intelligent and voluntary." 933 F. Supp. at 1515.

of the lower courts' decisions exposes the fallacy of petitioner's ludicrous accusation that they failed to consider the totality of circumstances.

1. Unlike the state courts, the courts below appropriately considered Wilkins' experienced defense attorney's repeated warnings that his client's waiver and plea were not knowing, voluntary and intelligent.

Mr. Fred Duchardt, "a seasoned defense lawyer," 933 F. Supp. at 1517, repeatedly warned the court that his client was not making rational decisions. Before Wilkins' attempted to waive counsel,

> Mr. Duchardt insisted that there was "considerable question" about petitioner's competency. Over Mr. Duchardt's protests, the court found him competent to proceed. Counsel again reiterated his belief that petitioner was not acting competently.

933 F. Supp. at 1502. It was clear to the court of appeals that Mr. Duchardt "did not believe that any of Wilkins' decisions were made knowingly, intelligently, and voluntarily," and he "consistently and forcefully made the same point in the trial court's proceedings." 145 F.3d at 1010. The court further observed that

> While Mr. Duchardt indicated to the court that he had attempted to explain all of the available options to Wilkins . . . , he testified that he never discussed lesser included offenses or ranges of punishment with Wilkins and that Wilkins did not give him an opportunity to explain all of his potential options.

145 F.3d at 1012.[11]

Wilkins' understanding of the mental element of first degree murder under Missouri law is an important consideration in this case "because there is much evidence to suggest

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[11]Upon receiving Dr. Mandracchia's report, Duchardt went to the Clay County Jail to visit Wilkins, intending to "begin, in earnest, preparation for Heath's defense." (Transcript of District Court hearing, hereafter "D.C. tr." 91). At that time, Wilkins told Duchardt that he wished to be put to death. (Ex. P-21, D.C. tr. 92). The court below found Duchardt's testimony that a discussion of possible defenses "never took place" to be clear and convincing. (J.A. 1236).

that, due to his mental disorders, he may not have been capable of deliberation," the mental state for first degree murder under Missouri law. 933 F. Supp. at 1517. Mr. Duchardt had "described this case as a very defensible one on this issue of mental state. Indeed, all of petitioner's co-defendants entered pleas of guilty to lesser offenses and received parole-eligible sentences." Id.[12]

The district court found Duchardt's testimony "to be clear and convincing that petitioner's waiver of counsel and plea of guilty were made without an adequate understanding of the charges against him and the available defenses." 933 F. Supp. at 1517. The district court was properly concerned that the Missouri courts completely ignored Duchardt's testimony:

> Mr. Duchardt's testimony was apparently overlooked by the state courts. When asked at the postconviction hearing whether he viewed Mr. Wilkins' decision to dismiss counsel, plead guilty and seek the death penalty as a decision made after "an intelligent weighing of the alternatives", Mr. Duchardt replied: "I never have and I never will."

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[12]Petitioner engages in hyperbole when he claims that the court below requires all defendants to be advised of the full range of punishment for all lesser offenses. The court merely noted that such knowledge was crucial *in this case* in light of Wilkins' statements at sentencing, when the trial court asked him for the very first time why he wanted to be put to death. Wilkins replied,

> DEFENDANT: I'm, I'm telling you, you know, I never stated flat out that I want the death penalty.
> THE COURT: Okay.
> DEFENDANT: I stated that I would prefer the death penalty over spending life in prison, you know.

(J.A. 791). The court on several occasions had advised Wilkins that the only possible outcomes of a trial would be acquittal, life without the possibility of parole, or death.

Id., n. 19. Although the state courts refused to acknowledge Duchardt's probative warnings and testimony, the federal courts appropriately considered them in its analysis of the totality of the circumstances.

2. **Unlike the state courts, the courts below appropriately considered the testimony of mental health experts, including state-employed examiners Dr. Steve Mandracchia and Dr. Sam Parwatikar, that Wilkins' was mentally disturbed, and did not act knowingly, voluntarily and intelligently.**

Wilkins' impaired mental and emotional condition is another piece of the totality of circumstances given mindful consideration by the courts below. Before trial, Wilkins was examined by state psychologist Steve Mandracchia, who found him competent, and testified accordingly at a hearing. Mr. Duchardt arranged a second evaluation by Dr. William Logan, a psychiatrist with the Menninger Clinic. Dr. Logan expressed reservations about Wilkins' competence, and cautioned the court that his mental and emotion disturbance could interfere with his ability to make appropriate decisions:

> As early as the first competency hearing, Dr. Logan testified to the numerous mental and emotional problems that interfered with Wilkins' "decision making process at certain critical points." . . . Dr. Logan described Wilkins as "a very impulsive individual who really doesn't think through the consequences of some of his decisions." Dr. Logan also indicated that Wilkins' upbringing was devoid of "supervision or tutoring or guidance in terms of how to use his mind to make rational common sense decisions."

145 F.3d at 1013-14. The trial judge ruled from the bench that Wilkins was competent, and over Mr. Duchardt's relentless protests, accepted Wilkins' waiver of counsel. Pursuant to Wilkins' pro se plea, the court sentenced him to death.[13]

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[13]The court of appeals found that

> The state trial court erroneously believed that its previous finding that Wilkins was competent to stand trial was alone sufficient to

On review of his death sentence in the Missouri Supreme Court, Wilkins repeated his desire to be put to death. The court appointed Dr. Sam Parwatikar to examine Wilkins to determine his "competence" to waive counsel. Dr. Parwatikar reported that Wilkins was not capable of waiving his right to counsel, 145 F.3d at 1010, and that Wilkins' mental disorders and upbringing were significant factors which rendered him unable to waive counsel. 145 F.3d at 1014. On Dr. Parwatikar's recommendation, "the Supreme Court of Missouri most tellingly refused to permit Wilkins to proceed pro se; it appointed counsel to represent Wilkins on direct review, despite Wilkins' persistent and professed desire to waive counsel at its proceeding as well." Id. The district court interpreted this action as "a finding in accord with Dr. Parwatikar's report: that the waiver of counsel was not intelligent and voluntary." 933 F. Supp. at 1512, citing Parker v. Dugger, 498 U.S. 308, 316 (1991). In spite of this finding, the Missouri Supreme Court affirmed Wilkins sentence.

While his appeal was pending, Wilkins had a change of heart and filed a motion asking to set aside his guilty pleas. Several mental health examiners testified in support of his motion. The court below briefly summarized that testimony:

> mandate a conclusion that Wilkins' waiver of counsel was valid. (See J.A. at 650.) We believe this legal error also invaded the direct review proceedings in the Supreme Court of Missouri. See Wilkins, 736 S.W.2d at 415 (holding that "a finding of competency necessarily entails the ability to waive certain rights"). It also permeated the postconviction court's conclusion. (Resp. Ex. G, at 92 ("The court concludes that the finding of competency of movant to proceed entailed the ability to waive certain rights and to make [the] decision to enter [a] plea of guilty and under the circumstances of this case to waive counsel and proceed pro se."))

145 F.3d at 1013.

> Dr. Dorothy Lewis, a professor of psychiatry at the New York University School of Medicine, explained that Wilkins' paranoia motivated his decision to waive counsel and that his thought processes were confused and illogical throughout the former proceedings. . . . Dr. William O'Connor, a psychologist, testified that Wilkins' guilty plea was not a voluntary and intelligent decision, but rather an emotionally-driven decision that was the product of his mental disorder. . . Dr. Logan also testified and agreed with Dr. Parwatikar's earlier conclusion that Wilkins was not "competent" to proceed as his own attorney, even though Dr. Logan was previously ambivalent regarding Wilkins' competence to stand trial. Dr. Logan also believed that Wilkins' waiver of counsel was an emotionally-charged impulsive decision. ([*Wilkins v. State*], 802 S.W.2d at 494.)

145 F.3d at 1010. The state called Dr. Mandracchia to rebut this evidence. However, "Dr. Mandracchia explained that his initial 95-minute examination was not designed to address the issue of whether Wilkins' waiver of counsel and guilty plea were knowing, intelligent, and voluntary." Id. On the state's motion, the court ordered Dr. Mandracchia to conduct another evaluation to determine whether Wilkins' waiver of counsel and plea of guilty were knowing, voluntary and intelligent. Dr. Mandracchia

> indicate[d] that Wilkins did not understand his legal alternatives. Dr. Mandracchia stated that Wilkins "would not, and functionally, could not, meaningfully entertain possibilities such as acquittal, insanity defense, conviction of a lesser included offense, mitigating circumstances, parole following a period of incarceration, etc."

145 F.3d at 1015-16. The district court observed that "Dr. Mandracchia further explained . . . that petitioner's reasoning in making the decision was seriously defective, that he did not consider alternative options and did not reach his decision in a logical fashion." 933 F. Supp. at 1514. The courts below repeatedly pointed out that the lay and expert testimony on the issue of whether Wilkins had made knowing, voluntary and intelligent decisions was "uncontroverted" and "unanimous." See, 145 F.3d at 1010, 1012, 1014; 933 F. Supp. at

1015. The court of appeals acknowledged that "the mental health of a defendant is also a relevant consideration in assessing whether a waiver of counsel was knowing, intelligent, and voluntary." 145 F.3d at 1012.

Like the state courts, petitioner simply ignores this extremely significant circumstance surrounding Wilkins' waiver of counsel and plea of guilty. "The postconviction court simply rejected the uncontroverted evidence as "unpersuasive." 145 F.3d at 1010. The Missouri court "made no fact-findings to indicate why it was unpersuaded by the unanimous testimony presented at the postconviction hearing." Id. at 1014. The district court found that "[i]t is puzzling and inexplicable why the state court did not make any findings or address whether petitioner's disturbing background of mental serious disorders had any bearing on his waiver of counsel and guilty plea." 933 F. Supp. at 1513. Furthermore, the district court observed that "[n]either state court considered petitioner's background or the unanimous opinion of all mental health professionals that the waiver was not intelligent and voluntary." Id. at 1515.

In fact, by ignoring the compelling evidence in the record about the background, ability and thinking process of the defendant, the Missouri courts in effect accepted a simple, mechanical litany of "yes/no" questions to suffice in finding a valid waiver instead of looking at the totality of the circumstances. Thus, it was the decisions of the Missouri courts that exemplify the "mechanical formula" or "checklist" approach so strongly condemned by petitioner, not those of the federal court. Rather, it was the federal courts who properly understood and applied the totality of circumstances approach adopted by this Court and who rejected the mechanical or rigid formula followed by the state courts.

3. Unlike the state courts, the courts below appropriately considered Wilkins' isolation, youth, and his history of abuse and neglect in determining whether his waiver of counsel and plea of guilty were knowing, voluntary and intelligent.

The court of appeals correctly observed that "[i]n the waiver of counsel context, . . . a defendant's background and personal characteristics are highly relevant in determining the validity of such a waiver." 145 F.3d at 1012. That consideration is particularly compelling in Wilkins' case:

> In the present case, while the state trial court briefly addressed Wilkins' youth and limited educational background . . . , the court took no account of Wilkins' upbringing. The record is uncontroverted that Wilkins was severely abused as a child by his mother and her boyfriends, that he had a history of drug abuse, and that by the age of 10, he had been in and out of mental health facilities and had been described as having demonstrated homicidal and suicidal tendencies.

145 F.3d at 1012-13. Even though Wilkins' was isolated and had no adult guidance, the state court gave no significance to that fact:

> The record also shows that petitioner did not talk to anyone else about the decision to waive counsel. When the trial judge asked petitioner if he had consulted with anyone about that, Mr. Wilkins replied "There's nobody else, nobody else who has a hand in my decision, your honor."

The district court referred to Dr. Logan's testimony to explain the relevance of such circumstances:

> Dr. Logan testified at the state evidentiary hearing that petitioner's lifetime without affection and nurturance had caused a "profound developmental arrest", severe mental disturbances and that he had attempted suicide several times. . . . Dr. Logan affirmed at this Court's hearing that petitioner was extremely disturbed and immature at age sixteen. His opinion is that petitioner did not voluntarily or intelligently waive his right to counsel and that he was strongly affected by "internal coercion".

933 F.3d at 1513. Dr. Lewis stated that Wilkins' "paranoid orientation . . . played a major role in his dismissing his attorney." Id. "Dr. Parwatikar further noted that [Wilkins'] mental

disorders made him less capable than other sixteen year old boys in making intelligent and voluntary decisions." 145 F.3d at 1512, n. 13.

A peculiar circumstance is the failure of Missouri courts to respond to the fact that Wilkins was abused by a jail guard on his way to court to plead guilty:

> [T]he trial court's only inquiry into "voluntariness" during the guilty plea was a question whether petitioner had received any promises or threats . . . But when petitioner reported that a guard had assaulted him that day, the court dismissed it without delving into the circumstances or effect of the incident.
>
> * * * *
>
> The assaulting officer remained in the courtroom throughout the plea and there were no further questions. Although the trial court did not explore this further, Dr. Logan testified that the incident would have intensified petitioner's decision to plead guilty by confirming that the future was hopeless with potential for further abuse.

933 F. Supp. at 1518. This was yet another circumstance weighing against the validity of Wilkins' waiver and plea, ignored by the state courts, but given appropriate consideration in the courts below. And again, this is yet another circumstance demonstrating that the courts below did not require a mechanistic formula but instead engaged in a conscientious consideration of the totality of the circumstances.

4. The courts below appropriately considered the record of the state competency, waiver of counsel, plea, sentencing and postconviction hearings, in addition to the totality of the circumstances, in finding that Wilkins' plea of guilty and waiver of counsel were not knowing, voluntary and intelligent.

Petitioner's complaint that the lower courts' concern about Wilkins ignorance of lesser offenses constitutes an unreasonable demand of "procedural exactitude" is absurd. The assertion that the court of appeals has mandated a new script for all plea hearings is nothing more than alarmist rhetoric. The opinions below are in perfect harmony with United States v. Broce, 488 U.S. 563 (1989), and McCarthy v. United States, 394 U.S. 459 (1969).

(Petition, p. 26). The courts below merely insist that a defendant understand the charges against him when waiving counsel or pleading guilty; the record in this case reflects that Wilkins did not.

Wilkins was charged with murder in the first degree, which requires a very high culpable mental state:

> Mo. Rev. Stat. § 565.020 (1984) provides that a person commits the crimes of murder in the first degree if he "knowingly causes the death of another person after deliberation on the matter." The only possible punishments are death and life in prison without the possibility of parole. Mo. Rev. Stat. sec. 565.032. Second degree murder, which carries a parolable sentence, does not include "deliberation". sec. 565.021; *State v. Jackson*, 511 S.W.2d 771 (Mo. 1974). Under Missouri law, deliberation means that the defendant acted after reflection, "in a cool frame of mind." *State v. Shaw*, 569 S.W.2d 375, 377 (Mo. App. 1978). If premeditation and malice are shown, but not deliberation, the offense is murder in the second degree. *State v. Ayers*, 470 S.W.2d 534 (Mo. 1971).

933 F. Supp. at 1516. The sentencing court never determined whether Wilkins' understood the elements of the charge. The uncontroverted evidence proves he did not.

This deficiency in the record is significant. The district court explained:

> It was particularly important for petitioner to understand the option of a second degree murder conviction because there is much evidence to suggest that, due to his mental disorders, he may not have been capable of deliberation. Although Dr. Logan found that petitioner would be competent to assist an attorney at trial, he testified that petitioner could not deliberate. . . . Mr. Duchardt, a seasoned defense lawyer, described this case as a very defensible one on this issue of mental state. Indeed, all of petitioner's co-defendants entered pleas of guilty to lesser offenses and received parole-eligible sentences.

Id. at 1517. In spite of the pivotal role that the mental element of the offense would play at a trial of Wilkins' case, the state court never discussed it with him. The district court found:

> The record here does not show that Petitioner understood the mental element of the crime charged or the defenses he would relinquish by pleading guilty. *The word "deliberation" or its legal equivalent was never used when he entered his guilty plea.* . . . The only words used in relation to mental states were "premeditated" and "knowingly" -- terms that describe the mental state for second degree murder under Missouri law. . . . Yet Mr. Wilkins entered a plea of guilty to first degree murder.
>
> Moreover, the trial court expressly told Mr. Wilkins that there were only two potential punishment options: the death penalty and life in prison without parole. . . . The record does not establish that petitioner knew, or was ever told, that at a trial, an attorney could present a "diminished responsibility" defense that might result in a conviction on the lesser included offense of second degree murder and receive a parolable sentence.

933 F. Supp. 1516-17. (emphasis added).

The court of appeals agreed that the state courts did not determine whether Wilkins understood the charge, stating, "*Given the combination of Wilkins' young age and the record evidence of his severely troubled childhood*, the state trial court's colloquy with Wilkins was far from the kind of in-depth inquiry that is necessary to ensure a valid waiver of counsel." 145 F.3d at 1013 (emphasis added). The court further agreed that "[t]he record reveals that at no time did the state court explain to Wilkins his possible defenses to the charges against him, nor did the court inform him of lesser included offenses or the full range of punishments that he might receive." Id. at 1012. Contrary to petitioner's claim, these statements do not establish that the court held that a trial judge must, in all cases, in all circumstances, explain in painstaking detail all elements of the charges and defenses possible. Rather, they confirm that in this case, consideration of the judge's advice to defendant was necessary to the validity of the plea in the totality of the circumstances:

> Moreover, the record does not establish that Wilkins possessed the required "understanding of the law in relation to the facts." McCarthy, 394 U.S. at 466. . . . [T]he state court did

> not discuss possible defenses such as diminished capacity; the court failed to inform Wilkins of possible lesser included offenses such as second degree murder and manslaughter; and the court did not explain the full range of potential sentences that Wilkins could receive. The court limited its discussion of sentences to the death penalty and life imprisonment without parole. . . . The court's omission of other potential sentences is quite significant in light of Wilkins' statement to the court that he did not absolutely wish for the death penalty but merely preferred it over spending the rest of his life in prison. . . . Additional reports from Dr. Mandracchia indicate that Wilkins did not understand his legal alternatives.

145 F.3d at 1015-16. Wilkins' sense of hopelessness arose in part from the admonition he received repeatedly from the trial court that his sole punishment options were "the death penalty or life imprisonment without probation or parole or release except by act of the governor." (J.A. 788). When the sentencing court finally asked Wilkins why he wanted to die, Wilkins replied, "I'm telling you, . . . I never stated flat out that I want the death penalty . . . . I stated that I would prefer the death penalty over spending life in prison. . ." (J.A. 791).

Both cursory and careful readings of the decisions of the district court and the court of appeals confirm that each court considered the statements and the actions of the state trial judge in the totality of circumstances. Nowhere in their opinions did they purport to impose blanket requirements on trial judges to say or do anything in particular in order to render a waiver of counsel or a guilty plea voluntary. Petitioner's suggestions to the contrary simply do not survive scrutiny.

CONCLUSION

The courts below painstakingly applied the appropriate legal standard in determining whether a homeless teenager with a history of abuse, neglect and psychiatric disorders acted knowingly, intelligently and voluntarily when he waived his right to counsel and pled guilty to a capital charge. Surprisingly, the Missouri courts--like petitioner--did not make a single

reference to any of well-documented and unrefuted information, despite their purported commitment to a totality of circumstances test. Petitioner does not challenge the district court's thorough discussion of the uncontroverted facts in the state court record, as well as the contradictory and inconsistent findings of the state court, because to do so would admit the obvious--that the court of appeals and the district court did not utilize mechanistic and rigid formulae, but instead examined the totality of the circumstances in reaching the inescapable conclusion that Wilkins' waiver of counsel and plea of guilty were not knowing, voluntary and intelligent.

As the arguments above plainly demonstrate, the federal courts' proper application of the totality of the circumstances test to the unique and troubling facts of this case poses no cert-worthy issue. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was forwarded by regular United States mail, postage prepaid, to:

Cassandra Dolgin
Assistant Attorney General
P. O. Box 899
Jefferson City, MO 65102

on this 30th day of November, 1998.

Counsel for Respondent

No. 98-674

IN THE UNITED STATES SUPREME COURT

October 1998 Term

This is a Capital Case

HEATH WILKINS,

Respondent,

vs.

MICHAEL BOWERSOX,

Petitioner.

APPENDIX TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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TABLE OF CONTENTS

Page

Defendant's Motion to Withdraw Guilty Pleas 1

Clay County Circuit Court Docket Sheets 4

Appellant's Motion to Stay Issuance of the Mandate 7

Court of Appeals Order 10

FILED
OCT 28 1998
TIME:
Clay County Circuit Court

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	Division 2
	)	
vs.	)	Case No. CR185-491FX and CR185-492FX
	)	
HEATH A. WILKINS,	)	
	)	
Defendant.	)	

MOTION TO WITHDRAW GUILTY PLEA

COMES NOW defendant Heath A. Wilkins, by counsel, and moves this Court pursuant to Missouri Rule 29.07D, the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and the mandate of the Eighth Circuit Court of Appeals in Wilkins v. Bowersox, No. 96-2441 (8th Circuit September 1, 1998), to grant defendant leave to withdraw his pleas of guilty entered in these matters on May 9, 1986. For his motion, defendant states:

1. Defendant on May 9, 1986 plead guilty in this Court to the offense of armed criminal action, CR185-492FX, and murder in the first degree, CR185-491FX, and was sentenced to life imprisonment and death, respectively. In a third case, CR185-490FX, defendant plead guilty to the offense of carrying a concealed weapon and was sentenced to five years, which sentence has been fully served. Defendant does not seek leave to withdraw his plea on this offense.

2. Defendant's pleas of guilty in the above-referenced cases were entered subsequent to a waiver of counsel, which was not knowingly, voluntarily and intelligently made. See Wilkins v.

Bowersox, No. 91-0861-CV-W-5 (W.D. Mo. May 15, 1996), affirmed, Wilkins v. Bowersox, No. 96-2441 (8th Circuit filed June 8, 1998).

3. In a federal habeas corpus proceedings pursuant to 28 U.S.C. § 2254, the United States District Court for the Western District of Missouri on May 15, 1996, conditionally granted the petition for writ of habeas corpus, and provided that the conditional writ "shall become unconditional and permanent unless the State of Missouri allows petitioner to withdraw his pleas of guilty and commences proceedings to afford petitioner a trial within sixty days of the date of this order." A true and correct of said judgment is attached hereto.

4. On motion of the State of Missouri, the aforementioned judgment granting the petition for writ of habeas corpus was stayed by the United States District Court on July 2, 1998, pending the state's appeal to the United States Eighth Circuit Court of Appeals. A copy of said order is attached hereto.

5. The Eighth Circuit Court of Appeals on June 8, 1998, affirmed the judgment of the district court. The state's motion to stay the mandate of the Eighth Circuit of Appeals was denied, and the court's mandate was issued, on September 1, 1998.

6. Defendant was unrepresented by counsel when he entered his pleas of guilty to the above-referenced charges. Furthermore, defendant lacked a rational understanding of the charges against him, potential defenses, and his legal rights with respect to his defense at the time of his pleas and convictions on the above-referenced charges.

7. Failure to allow defendant to set aside his pleas would result in a manifest injustice. State v. Arnold, 419 S.W.2d 59 (Mo. 1967); State v. Blaylock, 394 S.W.2d 364 (Mo. 1965); State ex rel City of Kansas City v. Meyer, 513 S.W.2d 414 (Mo. 1974). Furthermore, an order allowing defendant to withdraw his pleas is necessary to comply with the mandate of the Eighth Circuit Court of Appeals.

WHEREFORE, defendant respectfully moves this Court to enter its order permitting him to withdraw his pleas of guilty to the above-referenced charges, and for such further relief as the Court deems appropriate.

Respectfully submitted,

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Counsel for Defendant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, on the 27th day of October, 1998, to Mr. Timothy Finnical, Clay County Prosecutor Office, 11 S. Water, Liberty, Missouri 64068.

Sean D. O'Brien

DOCKET SHEET

Circuit Court, Clay County, Missouri

File No. CR185-490FX

Nature of Action:	State of Missouri Plaintiff/Petitioner	John Newberry Dan White Att. for Plaintiff or Petitioner
	vs.	
	PD Heath Wilkins aka Pyzon Defendant/Respondent	Cynthia Short Sean O'Brien Att. for Defendant or Respondent

Date	Orders of Court
JUN 27 1986	Comes now state by ~~att~~ prosecuting attorney and defendant ~~in~~ person and ~~by attorney~~ _____. Punishment assessed against defendant at [illegible] ~~in the Clay County Jail~~ in the Missouri Department of Corrections and Human Resources. Allocution, sentence and judgment accordingly. Judgement entered against defendant and in favor of the State of Missouri in the amount of $26.00 for the Crime Victims ~~Compensation Fund.~~ [illegible] PO notified
Oct. 15 87	Mandate from Supreme Court of Missouri filed affirming judgment and sentence. ph
Oct 30 1998	Comes defendant in person & with attys. O'Brien & Short and State by assistant pros. White. Court makes record on defendant's motion to set aside guilty pleas of defendant in case No. CR 185-490, CR 185-491, & CR 185-492. Court Orders guilty pleas in all three casues set aside & held for naught. Defendant waives reading of charge and enters plea of not guilty in all 3 causes of action. Defendant files in open Court motion for discovery & delivers copy to State. Court orders parties to file all notices & pre-trial motions on or before 12/18/98. Court orders parties to appear for scheduling conference on 12/21/1998 at 9:00 am. DWR:dmp

ATTEST A TRUE COPY
RITA FULLER
CLAY COUNTY CIRCUIT CLERK
BY [illegible] D.C.

BEST AVAIL

Defendant/Respondent

(IC)

DOCKET SHEET

Circuit Court, Clay County, Missouri

File No. CR 185-491FX

Nature of Action:	State of Mo.	
	Plaintiff/Petitioner	
	vs.	Att. for Plaintiff or Petitioner
	Heath Wilkins	Sean O'Brien Cynthia Short
	Defendant/Respondent	Att. for Defendant or Responden

Date	Orders of Court
OCT 30 1998	Case; Δ in custody with Att.: O'Brien + Short + state by Asst. Pros. Atty. Wilson. Matter coming on Δ's motion to set aside guilty plea of Δ in case no. CR 185-491 & CR 185-492 & enter guilty plea in all three cases at which a hold for report Δ waives rights & elects and enters plea of guilty; all & each of which Δ files in open court; state & Δ discuss & Δ's rights explained to Δ; Court grants motion to file all motions & oral motions on or before 12/18/98. State grants Δ's request for setting out on 12/21/98 at 9:00 a.m. SAH!

ATTEST A TRUE COPY
RITA FULLER
CLAY COUNTY CIRCUIT CLERK
BY Phyllis Fairchild D.C.

ABLE COPY

DOCKET SHEET

Circuit Court, Clay County, Missouri

ONE

File No. CR185-492F X

Nature of Action:	State of Missouri	Larry Harman
Class A felony armed criminal ~~action~~ INformation	Plaintiff/Petitioner vs. Heath Wilkins AKA Pyzon	Att. for Plaintiff or Petitioner
	Defendant/Respondent	Att. for Defendant or Respondent

~~et~~ ~~or~~ ~~tmp~~ ~~o~~ ~~at~~

DOCKET SHEET

Circuit Court, Clay County, Missouri

File No. CR 185-492FX

Nature of Action:	State of Missouri	John Newberry Dan White
	Plaintiff/Petitioner vs.	Att. for Plaintiff or Petitioner
	Heath A. Wilkins PD	Cynthia Short Sean O'Brien
	Defendant/Respondent	Att. for Defendant or Respondent

Date	Orders of Court
Oct 30 1998	Comes defendant in person & with attys. O'Brien & Short and State by assistant pros. White. Court makes record on defendant's motion to set aside guilty pleas of defendant in case No. CR 185-490, CR 185-491, & CR 185-492. Court Orders guilty pleas in all three casues set aside & held for naught. Defendant waives reading of charge and enters plea of not guilty in all 3 causes of action. Defendant files in open Court motion for discovery & delivers copy to State. Court orders parties to file all notices & pre-trial motions on or before 12/18/98. Court orders parties to appear for scheduling conference on 12/21/1998 at 9:00 am. DWR:dmp

ATTEST A TRUE COPY
RITA FULLER
CLAY COUNTY CIRCUIT CLERK
BY [signature] D.C.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

HEATH ALLEN WILKENS,	)	
	)	
Appellee/Petitioner,	)	
	)	
vs.	)	No. 96-2441WMKC
	)	
MICHAEL BOWERSOX,	)	
	)	
Appellant/Respondent.	)	

MOTION TO STAY ISSUANCE OF THE MANDATE

Comes now respondent, by and through counsel, and states as follows in support of his motion to stay issuance of the mandate.

On July 13, 1998, the petition for rehearing with suggestions for rehearing en banc was denied. Respondent intends to file a petition for writ of certiorari with the United State Supreme Court. Supreme Court Rule 10. Respondent believes that circumstances of this case justify a stay of mandate under Eighth Circuit Rule 41A.

Respondent bears the burden of showing that the issues to be presented to the United States Supreme Court are appropriate for its determination. Eighth Circuit Rule 41A. The standard requires reference to Supreme Court Rule 10 for the criteria the United States Supreme Court uses to decide whether to exercise its discretion to issue a writ of certiorari. Several issues may merit United States Supreme Court consideration.

The first issue is whether a knowing, intelligent, and voluntary waiver of counsel, entry of a guilty plea, and waiver of presenting mitigating evidence, requires that the trial court explain to the defendant all possible defenses to the charges against him, inform the defendant of lesser-included offenses, and advise the defendant of the full range of punishments including that for all lesser included offenses. A related issue is whether

such advice must be limited to the specific facts underlying the offense and thus, the effect of advising a defendant of a nonviable defense, or whether it is sufficient to provide the defendant with a generic, all inclusive list of defenses and possible lesser-included offenses. This has not yet been addressed by the Supreme Court. To the extent that it has been addressed in United States v. Broce, 488, U.S. 563 (1989), this Court's treatment of the issue is inconsistent.

A second issue stands out for Supreme Court review. As the court is aware, neither Faretta v. California, 422 U.S. 806 (1975) (addressing the requirements for a valid waiver of counsel to enter a valid guilty plea) nor United States v. Broce, 488 U.S. 563 (1989) (determining that a defendant need not be advised of all defenses) adopted the plurality opinion of Von Moltke v. Gillies, 332 U.S. 708 (1948), for the proposition that a valid waiver of the right to counsel or the entry of a guilty plea require that the court advise the defendant of all possible defenses to the charges against him, inform the defendant of lesser included offenses, and advise the defendant of the full range of punishments including that for all lesser included offenses.

Wherefore, for the reasons herein stated, respondent prays the court issue an order staying issuance of its mandate.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

CASSANDRA K. DOLGIN
Assistant Attorney General
Missouri Bar No. 38821

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, certified via the U.S. Postal Service, on 15 July 1998, to:

Sean O'Brien
Public Interest Litigation Clinic
5319 Rockhill Road
Kansas City, MO 64110

CASSANDRA K. DOLGIN

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-2441WMKC

Heath Allen Wilkins,

Appellee,

vs.

Michael Bowersox,

Appellant.

Appeal from the United States District Court for the Western District of Missouri

Appellant's motion for stay of mandate pending the filing of a petition for writ of certiorari in the United States Supreme Court has been considered by the court and is denied.

September 1, 1998

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit